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No. 92-1987

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUSAN MORTON and WILLIAM MORTON,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below err in holding, under admiralty law, that a cruise line is absolutely liable for an assault committed by a crew member upon a passenger, without regard to whether the assault was within the course and scope of the crew member's employment?

2. Did the court below err in holding that a cruise line in a personal injury action is held to a strict liability standard for assaults committed by crew members against passengers, rather than a standard of reasonable care under the circumstances?

LIST OF PARTIES

Plaintiffs

Susan Morton

William Morton

Defendants

Carnival Cruise Lines, Inc.

Joaquin Martins De Oliveira

There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated January 19, 1993, is to be reported at 984 F.2d 289 and 1993 A.M.C. 843, and is reproduced at pages 1a through 8a of the Appendix to this Petition ("Pet. App."). The summary judgment order and the judgment of the United States District Court for the Central District of California are not reported and are reproduced at Pet. App. 9a-16a. A preliminary ruling and order of the district court is reproduced at Pet. App. 17a-18a.

JURISDICTION

The decision of the Court of Appeals was entered on January 19, 1993. Pet. App. 1a. A timely petition for rehearing was denied on March 17, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

No constitutional provisions, statutes, or rules are involved.

STATEMENT OF THE CASE

This case involves an action against a cruise line for personal injuries allegedly sustained by passengers during a vacation cruise. The claim is based on the admiralty and maritime jurisdiction of the federal courts, 28 U.S.C. § 1333.

Respondent Susan Morton (hereinafter "Ms. Morton") alleges that she was drugged and sexually assaulted by an off-duty crew member aboard the cruise ship M/V TROPICALE while she and her husband, Respondent William Morton, were passengers. The M/V TROPICALE is owned and operated by Petitioner Carnival Cruise Lines, Inc. (hereinafter "Carnival"). While Carnival disputes the Respondents' factual allegations, these allegations are taken as true for purposes of the summary judgment motion at issue here.

Ms. Morton alleges that on the night of February 16, 1989, while her husband was gambling in the ship's casino, their dining room waiter, Joaquin Martins De Oliveira, came to the Mortons' cabin with a bottle of wine. Pet. App. 2a, 9a. Ms. Morton invited Oliveira into the cabin to share the wine. *Id.* Ms. Morton alleges that Oliveira drugged the wine, waited for her to become incapacitated, and then raped her. *Id.* She did not tell her husband about the attack for the rest of the cruise or for several weeks thereafter, nor did she report the attack to any ship personnel. *Id.*

The undisputed evidence indicated that if Oliveira was present at the Mortons' cabin, he was violating Carnival's regulations, which prohibited crew members from being in passenger cabins "unless in the line of their specific duty." Pet. App. 14a.[1] The undisputed evidence further indicated that Oliveira, as a dining room steward, "had no reason to be in, and was, in fact, prohibited from being in, plaintiffs' cabin." Pet. App. 14a-15a. The Mortons concede that there was no evidence Carnival provided inadequate security or failed to exercise reasonable care in the selection, retention, or supervision of Oliveira. Pet. App. 3a, 10a.

Based on the above agreed facts, Carnival moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The United States District Court for the Central District of California, the Honorable Matthew Byrne, Jr. presiding, found that Carnival owed its passengers the duty of exercising reasonable care under the circumstances. Pet. App. 10a. The court noted that the Mortons did not dispute that there was no evidence of a breach of Carnival's duty of care. Pet. App. 10a. Carnival's motion for summary judgment was therefore granted.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed. The appellate court based its analysis on its prior decision in *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926), which held that a common carrier of passengers is absolutely liable for the intentional torts of its employees, regardless of whether the torts are within the scope of their employment. Pet. App. 6a-7a. The Ninth Circuit held that the Mortons "would be entitled to recover from Carnival simply by showing that the assault was committed by the crew member during the voyage."

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[1] Ship's Rules and Regulations, *reproduced in* Defendant Carnival Cruise Lines, Inc.'s Response To Request For Production of Documents Propounded By Plaintiffs (Exhibit B), Aug. 4, 1990.

Pet. App. 4a. The Ninth Circuit therefore remanded with instructions that "the Mortons should be allowed to proceed to trial." Pet. App. 8a.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTION VESTS THIS COURT WITH RESPONSIBILITY FOR MAINTAINING A UNIFORM BODY OF ADMIRALTY LAW

The importance of national and international uniformity in maritime law is well established in the decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 221 (1986); *Sea-Land Servs., Inc. v. Gaudet,* 414 U.S. 573, 601 (1974); *The Lottawanna,* 88 U.S. (21 Wall.) 558 (1874). As this Court explained in *The Lottawanna,*

> the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. (21 Wall.) at 575.

And as Publius expressed in *The Federalist* No. 80,

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to public peace. The most important part of them are, by the present [Articles of] Confederation, submitted to federal jurisdiction.

The Federalist No. 80 (Alexander Hamilton).

The Framers therefore provided in Article III § 2 of the Constitution that the federal judicial power extends "to all Cases of admiralty and maritime Jurisdiction." This provision, athough on its face only a jurisdictional grant, has long been construed as incorporating the pre-existing law of admiralty into the law of the United States. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828). Congress can, of course, modify the laws of admiralty by legislation, but the need for national and international uniformity in admiralty law is critical enough that even Congress is limited in its power to authorize the states to adopt rules of law that would lead to state-by-state variations in admiralty. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

For the reasons given below, this Court should exercise its important power over admiralty in this case to correct a persistent error by the Ninth Circuit in the application of this Court's doctrine of *respondeat superior* in admiralty cases and to provide needed clarification for lower courts that the standard of care owed by shipowners to passengers is reasonable care under the circumstances.

II. REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE NINTH CIRCUIT HAS REPEATEDLY HELD, IN CONTRAVENTION OF THIS COURT'S PRECEDENT, THAT ADMIRALTY LAW MAKES A CARRIER ABSOLUTELY LIABLE FOR AN EMPLOYEE'S INTENTIONAL TORTS EVEN WHEN OUTSIDE THE SCOPE OF EMPLOYMENT

Under the standard employed by the Ninth Circuit, a cruise line is absolutely liable for an employee's intentional tort committed outside the course and scope of employment even though, as here, the shipowner exercised all

reasonable precautions in screening, hiring, retaining and supervising its crew and providing adequate shipboard security. However, in a decision that was entirely ignored by the court below, this Court has indicated that a shipowner cannot be held liable for an assault by a crew member unless the assault is committed in the course and scope of employment. *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887).

Brockett, like this case, involved a crew member's alleged assault upon a passenger. Plaintiff in *Brockett*, travelling as a deck passenger, sustained injuries when assaulted by crew members attempting to remove him from an area of the ship that was off-limits to deck passengers. This Court held:

> If the injuries necessarily arose from [plaintiff's] violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were . . . directly caused by the improper conduct of the carrier's servants, *either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them*, [plaintiff] is not precluded from claiming the benefit of the contract for safe transportation.

Id. at 645 (emphasis added).

Although the *Brockett* court found the shipowner liable, the Honorable Justice Harlan, writing for a unanimous court, repeatedly emphasized that liability was premised upon the crewmen acting in the course and scope of their employment when committing the assault:

> Their misconduct or negligence *whilst transacting the company's business, and when acting within the general scope of their employment*, is of necessity to be imputed to the corporation, which constituted them agents for the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraud-

> ulent, *'if,'* as was adjudged in *Philadelphia & Reading Railroad Co. v. Derby,* 14 How. 468, 486, *'it be done in the course of his employment,* the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, *if the act be done in the course of his servant's employment.'*

Id. (emphasis added).

The Court in *Brockett* repeatedly referred to the requirement that the assault must have been committed in the scope of the crew member's employment for liability to be imputed. The plainly indicated qualification of *Brockett* is that if a crewman is not acting within the course and scope of his employment in committing an assault, the shipowner is not liable.[2] This qualification followed from the fact that the shipowner's liability in *Brockett* was based on the doctrine of *respondeat superior,* which had always been understood to impose vicarious liability on employers only for acts of employees committed in the scope of their employment:

> "This rule," the court of appeals of New York well says, "is founded upon public policy and convenience. Every person is bound to use due care *in the conduct of his business. If the business is committed to an agent or servant,* the obligation is not changed."

121 U.S. at 645 (emphasis added) (citation omitted).

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[2] Indeed, the Court in *Brockett* reiterated the "scope of employment" qualification no fewer than seven times. *See* 121 U.S. at 645 ("within the scope of their general employment, or when in the discharge of special duties imposed upon them"); *id.* ("whilst transacting the company's business, and when acting within the general scope of their employment"); *id.* ("done in the course of his . . . employment"); *id.* ("in the conduct of his business"); *id.* at 646 ("engaged in executing the contract"); *id.* ("enforcement of reasonable regulations established by the carrier for the conduct of its business"); *id.* at 649 ("while assisting another servant in enforcing [the ship's] regulation as to deck passengers").

In *Brockett*, the assault was committed by on-duty crewmen in furtherance of the shipowner's business and within the duties of the crew: The crew were acting—albeit with excessive force—to cause the passenger to leave a part of the ship where he was not permitted to be. Here, in contrast, it is undisputed that Oliveira's alleged assault was plainly not committed in furtherance of Carnival's business, and, in fact, that Oliveira was violating the ship's regulations even by his mere presence in the passenger area.

Rather than consider whether the assault was within the scope of Oliveira's employment, the *Morton* court followed the Ninth Circuit's prior decision in *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926), which had also held a shipowner absolutely liable for the assault of a crew member upon a passenger, regardless of whether the assault was within the scope of employment. The Ninth Circuit's decision in *Morton*, as noted, never cites nor evaluates this Court's controlling decision in *Brockett*. The Ninth Circuit's 1925 decision in *Pacific* does cite *Brockett*, but it wholly disregards the extensive language in *Brockett* limiting vicarious liability only to torts committed within the scope of the crew member's employment.[3]

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[3] The Ninth Circuit in *Pacific* relied chiefly on a Washington Supreme Court case, *Marks v. Alaska S.S. Co.*, 71 Wash. 167, 127 P. 1101 (1912), for the proposition that "the rule is well nigh universal that the carrier cannot plead as a defense that the servant acted outside the scope of his employment." The *Marks* decision, however, cited no authority for the supposedly "universal" rule. On the contrary, just prior to announcing the rule, the *Marks* court cited Thompson's *Law of Negligence*, which states a carrier's liability for an assault must be premised on a lack of due care. *See Marks*, 127 P. at 1102 (citing 3 Thompson, *Law of Negligence* §§ 3184, 3186-87). Confusingly, the *Marks* court also stated:

> It is undoubtedly the rule that a carrier is ordinarily *not* responsible for the tortious acts of his servants unless the servant

The Ninth Circuit sought to justify its continued adherence to *Pacific* on the basis that absolute liability for a crew member's intentional torts "cannot be traced to obsolete concepts regarding real property and feudalism," unlike the distinction between invitees and licensees that this Court rejected in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Pet. App. 6a. The Ninth Circuit then relied upon state tort law cases for the proposition that "common carriers owe such an absolute duty to their passengers." *Id.* In doing so, the Ninth Circuit disregarded not only this Court's decision in *Brockett*, but also the long-established rule that the standard of care in a maritime personal injury case is governed by maritime law, not state law. *See Kermarec*, 358 U.S. at 628.[4]

> is engaged in the contract of carriage, or, as said above, 'in the discharge of their assigned and appropriate duties' . . . .

127 P. at 1101 (emphasis added).

[4] The uncertainty of some lower courts as to the *respondeat superior* issue in admiralty cases is illustrated by the Second Circuit's decision in *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914). The passenger in *Rivers* was sailing from New York to Europe when a crew member entered her cabin using a pass-key that had been lost by another crew member. The passenger was assaulted in her cabin by the crew member. In reviewing the district court's jury instructions, the Second Circuit was unclear whether a finding of liability by the shipowner required the assault to be within the course and scope of the crew member's employment:

> Standing alone, [the charge] might possibly lead a jury to believe that the defendant was to be treated as an insurer of the safety of its passengers. But it did not stand alone. The judge charged expressly, more than once, that defendant was not an absolute insurer against assaults of this sort. *He pointed out the difference between an assault by an employee when carrying out the orders of his employer and a wanton one, committed when off duty.* . . . From a careful study of the whole charge . . ., we have reached the conclusion that Judge Holt was apprehensive that the distressing circumstances attending the assault might prejudice the jury. There-

III. REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE NINTH CIRCUIT, IN IMPOSING ABSOLUTE LIABILITY, UNDERMINED THE IMPORTANT AND UNIFORM ADMIRALTY LAW STANDARD OF REASONABLE CARE UNDER THE CIRCUMSTANCES

In the absence of a basis for holding a shipowner vicariously liable for the intentional torts of an off-duty crew member committed outside the course and scope of employment, liability can be founded only upon tortious conduct by the shipowner itself. In the present case, it is conceded that Carnival was not negligent.

For over 100 years, this Court has consistently held a negligence standard controls the duty of a shipowner to passengers. A corollary to this rule is that a shipowner is not the absolute insurer of passengers' safety. The Ninth Circuit's imposition of absolute liability is wholly inconsistent with this Court's case law defining a shipowner's standard of care.

The principle that a carrier is not an absolute insurer of the safety of its passengers was first enunciated in *Stokes v. Saltonstall*, 28 U.S. (13 Pet.) 181, 191 (1839):

> It is certainly sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God and the public enemy. *But although he does not warrant the safety of the passengers, at all events,* yet his undertaking and liability as to them, go to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; *and that as far as*

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fore he was most careful, even at the risk of giving some sound exceptions to plaintiff, to impress upon the jury that there could be *no recovery unless the proof showed some specific neglect* in exercising that degree of care which reasonable prudence would require of a carrier obligated to be watchful and vigilant to protect its sleeping passengers.

Id. at 298-99 (emphasis added).

> *human care and foresight can go, he will transport them safely.*

Id. at 191 (emphasis added).

Although *Stokes* involved a stagecoach accident, the rule that a carrier is not the absolute insurer of its passengers was soon held to apply to passenger ships. *The City of Panama*, 101 U.S. 453 (1880). In *The City of Panama*, a passenger travelling from Washington to San Francisco was injured when she fell through an open hatch in the floor of her cabin. Plaintiff sued alleging both negligence and breach of the contract of passage. The Court held passengers must present some proof of negligence to recover under either a tort or contract claim.

> [T]he owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, . . . Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill, and caution of the carrier, in the preparation and management of the means of conveyance, are unable to avert.

Id. at 462 (citations omitted).

The negligence standard has been required by this Court, without exception, as a prerequisite to a shipowner's liability to passengers. *Leathers v. Blessing*, 105 U.S. (15 Otto) 626 (1882); *The Admiral Peoples*, 295 U.S. 649 (1935).

In 1959, the Court re-examined the standard of care owed by shipowners to non-crewmembers generally in the landmark case *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). *Kermarec* involved an injury to a crewmember's friend who was visiting the vessel. The Court affirmed its prior application of the negligence standard to shipowners, adopting a general rule requiring a showing of negligence as a condition to liability: "We hold that the owner of a ship in navigable

waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632.

The reasoning of the Ninth Circuit below is inconsistent with the approach followed in *Kermarec*. Without any analysis or discussion, the *Morton* court concluded that "there is no doubt that the M/V CARNIVALE is a common carrier." Pet. App. 7a. The court then compared the legal duties of a cruise ship to those of other "common carriers" including trains and taxi cabs. *Id.* Seizing upon the "common carrier" standard, which had historically required exercise of a heightened standard of care, *Morton* held that the Supreme Court had "implicitly exempted" certain unspecified "meaningful categories" of cases from the reasonable care standard established in *Kermarec*. *Morton* erroneously determined that assault victims were such a subcategory of persons which this Court had "implicitly" exempted from the negligence standard enunciated in *Kermarec*.

Most courts have interpreted *Kermarec* to support a uniform rule that shipowners owe passengers a duty to exercise reasonable care under the circumstances of each case. For example, the First Circuit in *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347, 354 (1st Cir. 1988), held that "the appropriate legal standard" in a claim for intentional infliction of emotion distress committed by a ship's photographer was "the duty of exercising reasonable care under the circumstances." *See also Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989).

Indeed, the standard of reasonable care under the circumstances is simply a corollary of the rule expressed in cases such as *Stokes* and *The City of Panama* that a carrier is not an absolute insurer. The flexible and widely-recognized standard laid down in *Kermarec* permits courts

to impose a higher level of care where circumstances warrant, such as in protecting passengers from uniquely maritime dangers that passengers do not normally experience ashore. *Keefe,* 867 F.2d at 1322. However, when circumstances aboard ships differ little from those encountered ashore, the applicable standard of care should remain the same as on land. *Id.*; *Rainey,* 709 F.2d at 172.

One of the first published post-*Kermarec* decisions involving a cruise line was *Rainey.* The passenger in *Rainey* tripped over a bar stool while dancing in the ship's discotheque. In analyzing the applicable standard of care, the Second Circuit wrote:

> We have stated on a number of occasions that an ocean carrier must exercise a very high degree of care for the safety of its passengers. Respected commentators long ago have contended, however, that "[t]echnically the 'high degree' instruction is incorrect as a matter of principle . . . ." "What is required", they say, "is merely the conduct of the reasonable man of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care." In some instances, reasonable care under the circumstances may be a very high degree of care; in other instances, it may be something less.

Rainey, 709 F.2d at 170-71 (citations omitted). *Rainey* recognized that *Kermarec* mandated a uniform standard of reasonable care in all passenger cases:

> Following the lead of the Fifth Circuit, we hold that the Kermarec rule of reasonable care under the circumstances is applicable in passenger cases. The extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger, will determine how high a degree of care is reasonable *in each case.*

Rainey, 709 F.2d at 172 (emphasis added).

The issue of the standard of care applicable to cruise lines was again raised in the Second Circuit in *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63 (2d Cir. 1988), which specifically rejected the notion that cruise lines should be absolute insurers of passengers' safety:

> Although some older cases called for a higher degree of care aboard ship, it is now clear in this Circuit that the appropriate standard is one of reasonable care under the circumstances . . . . Consistent with these principles, a shipowner is not an insurer of its passengers' safety. *There thus must be some failure to exercise due care before liability may be imposed.*

Id. at 64-65 (citations omitted) (emphasis added). The *Monteleone* court also held the imposition of strict liability in passenger cases was incorrect, as a matter of law: "[T]he district court erred as a matter of law in holding that merely *allowing* the screw to protrude constituted a breach of BCL's duty to Mrs. Monteleone. In so holding, the court incorrectly made BCL an insurer of Mrs. Monteleone's safety." *Id.* at 65.

The same conclusion was reached by the Sixth Circuit in *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71 (6th Cir. 1990), which extensively reviewed the prior decisions of the Supreme Court and the various circuits, and observed that proof of negligence had been required in passenger maritime cases for over 100 years. The Court acknowledged that the " 'extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to a passenger, will determine how high a degree of care is reasonable in each case.' " *Id.* at 74 (quoting *Rainey*, 709 F.2d at 171).

Since the chances of a sexual assault occurring on a ship are no greater than those in a hotel ashore, these same legal principles should apply at sea as on land. In *Jaffess v. Home Lines, Inc.*, 1990 A.M.C. 1430 (S.D.N.Y. Apr. 22, 1988), which is directly on point with the present case, the court specifically noted:

> [W]e disagree with Jaffess' assertion that sexual assaults are more likely to occur on ships because ships are "closed" and "isolated" in nature. On the contrary, since ships do have so many employees and so many passengers, there are fewer situations in which a person will find oneself isolated than on land. Further, a person committing a sexual assault on land usually has an opportunity to flee the vicinity, while a person on ships cannot. If anything, sexual assault seems less likely to occur on ships than on land. We therefore find that what qualifies for "reasonable care under the circumstances" in this case is not enhanced because this incident took place on a ship rather than on land.

Id. at 1435.

Under the strict liability standard imposed by the Ninth Circuit, Carnival was clearly made the absolute insurer of the safety of its passengers. The logical conclusion is that any cruise line would be liable, even when it exercises all reasonable precautions in screening, hiring, retaining and supervising its crew and providing adequate shipboard security, all of which was conceded by Respondents below. If this Court does not make clear that the approach followed in the *Morton* decision is improper, courts will feel free to depart from this Court's reasonable care standard whenever they find a "meaningful category" or subcategory which, in their subjective view, should be exempted.

The standard of care applicable in any lawsuit is a threshold issue of singular importance in shaping the litigation. This Court should therefore grant certiorari to resolve the issue of the standard of care applicable to passenger suits and, in doing so, maintain the essential uniformity of maritime law.

IV. REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE SCOPE OF VICARIOUS LIABILITY HAS IMPORTANT PUBLIC POLICY IMPLICATIONS

During the century that has elapsed since this Court decided *Brockett*, many eminent legal scholars have explored the history and justification for the doctrine of vicarious liability. Holmes traced it to the "primitive law of deodands and noxal surrender" as reflected in Roman law, while Wigmore "thought the roots grew in German rather than Roman soil." [5] Although other questions were raised about the ancient roots of the doctrine, it was generally accepted that its modern version stems from the dicta of Lord Holt in the late seventeenth century.[6]

In the first half of the twentieth century, legal scholars conducted a lively debate over the validity and appropriate contours of the doctrine of vicarious liability. Prosser observed that a "multitude of very ingenious reasons have been offered" in support of the doctrine, although "courts have made little or no effect to explain the result, and have taken refuge in rather empty phrases . . . or the endlessly repeated formula of 'respondeat superior,' which in itself means nothing more than 'look to the man higher up.' "[7] One early scholar made the observation

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[5] 5 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* (2d ed. 1986) (citing Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891), 5 Harv. L. Rev. 1 (1892), and Wigmore, *Responsibility for Tortious Acts*, 7 Harv. L. Rev. 315 (1894)).

[6] *Id.* at 10 (citing *Boson v. Sandford*, 2 Salk. 440, 91 Eng. Rep. 382 (K.B. 1689) and other cases).

[7] William L. Prosser, *The Law of Torts* 459 (4th ed. 1971). Among the authorities cited by Prosser are Warren Seavey, Harold Laski, William O. Douglas, and Fleming James. For an exploration of the central role of Fleming James in the expansion of tort liability, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Leg. Studies 461 (1985).

that, "[i]n hard fact, the reason for the employers' liability is the damages are taken from a deep pocket." [8]

By the middle of the century, most scholars came to the view that the doctrine of vicarious liability can be justified only as a rule of policy, based on the notion that an employer is best able to spread the cost of injuries to society at large.[9] One leading treatise states that "by fictions and procedural devices [modern tort law] has subordinated fault to the need for compensation supported by enterprise liability. Vicarious liability is one of the cornerstones of this newer structure." [10]

Over the past decade, however, an even newer wave of legal scholarship has called into question the once-dominant view that expansive doctrines of tort liability represent sound policy.[11] Among other things, the efficiency of the tort system has been called into question by studies showing that legal fees and other transaction costs generally exceed the amount of money that actually goes to compensate victims.[12]

In this context, it is certainly appropriate for this Court to reexamine the contours of the doctrine of vicarious liability in maritime law. If the "scope of employment" test applied in *Brockett* is to be supplanted by a test of absolute liability such as that adopted by the Ninth Circuit, then this Court itself should consider the wisdom of such a far-reaching change in the law.[13] Scrutiny of such

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[8] Baty, *Vicarious Liability* 154 (1916).

[9] Prosser, *supra*, at 459 and authorities cited therein.

[10] Harper, James & Gray, *supra*, at 20-21.

[11] *See generally* American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* (1991) and authorities cited therein.

[12] See James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* (1986) (RAND study).

[13] Moreover, as an intermediate state court has astutely pointed out, there is no basis for departing from these basic rules simply

a change is particularly appropriate because it would create a departure not only from the rule expressed in *Brockett*, but also from longstanding principles of shoreside law. *See* American Law Institute, *Restatement (Second) of Agency* §§ 216, 228, 234-35, 245 (1958).[14]

This is an issue of practical, as well as theoretical, importance. Personal injury cases involving maritime law constitute a significant portion of the federal civil docket, with 2,752 cases being filed in the last year.[15] The cruise industry in the United States has grown enormously over the past two decades, now embarks over 4 million passengers a year, and is predicted to embark some 8 million by the year 2000.[16] This Court should clarify the ap-

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because a claim is brought under a theory of breach of contract or warranty instead of in tort. *See G.L. v. Kaiser Found. Hosps., Inc.*, 746 P.2d 731 (Or. Ct. App. 1987), *aff'd*, 757 P.2d 1347 (Or. 1988) (*en banc*). In *Kaiser*, a hospital patient was sexually assaulted by a hospital employee, and the patient sued for breach of an implied warranty of safety. The court held that an employer is responsible only when it is negligent or when the employee acted in the course and scope of his or her employment. *Id.* at 734. The court observed that plaintiff's implied warranty theory would "eliminate the negligence standard" and "replace it with an absolute liability standard through the artifice of placing a contract label on what is inherently a matter of tort law." *Id.* at 734.

[14] For example, hotels and similar establishments are generally not strictly liable for an employee's assault upon a guest, provided that the establishment exercised reasonable care for the safety and protection of its guests; rather, an employee committing a criminal act outside the scope of his employment is considered a third person for whom there is no vicarious liability, absent independent negligence on the part of the employer. *See* American Law Institute, *Restatement (Second) of Torts* § 344 cmt. b (1965).

[15] Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 28 (1992) (for year ending September 30, 1992).

[16] *See* Allen Borcover, *Positive Attitude: Some Aspects of Travel Industry See Better* '93, Chi. Trib., Nov. 8, 1992, at 2.

plicable law and provide guidance to the lower courts on the proper standards of liability in such cases.

CONCLUSION

This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55125

D.C. No. CV-90-0315-WMB

SUSAN MORTON; WILLIAM MORTON,
Plaintiffs-Appellants,

v.

JOAQUIN MARTINS DE OLIVEIRA, and
CARNIVAL CRUISE LINES, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
February 6, 1992—Pasadena, California

Filed January 19, 1993

Before: Melvin Brunetti, Diarmuid F. O'Scannlain, and
Thomas G. Nelson, Circuit Judges

Opinion by Judge Brunetti

John N. Connell, Anderson & Connell, Bellingham, Washington, for the plaintiffs-appellants.

William L. Robinson, Lillick & Charles, Long Beach, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

This admiralty case arises from an alleged rape on board a cruise liner. We must decide whether the Supreme Court has implicitly overruled this circuit's law that a ship owner is absolutely liable for a crew member's assault on a passenger.

I

Plaintiffs Susan and William Morton paid to take a cruise in 1989 on the M/V Carnivale, a ship owned and operated by Carnival Cruise Lines, Inc. Crew member Joaquin De Oliveira served as their regular dining room waiter.

One evening, while William Morton was at the ship's casino, Susan Morton was alone in their cabin when, according to her account, De Oliveira appeared at her door with a bottle of wine and two glasses and said he thought the Mortons would like to sample some.

Susan asked him in and they exchanged pleasantries and each had a glass of wine. According to Susan, she began to feel dizzy. She asked De Oliveira to get her husband, but instead De Oliveira pushed her on the bed and raped her. She did not tell her husband immediately about the attack nor did she report it to authorities aboard the ship.

De Oliveira, who no longer works for Carnival and apparently cannot be located, made a statement to a Carnival security official in which he denied raping Susan Morton. He claimed in essence that he was delivering a container of milk when she invited him inside for some wine and then attempted to seduce him. He denied having intercourse with her. Several weeks after the cruise

ended, according to her deposition, Susan Morton told her husband she had been assaulted by De Oliveira during the cruise.

The Mortons sued De Oliveira and Carnival Cruise Lines. After a period of discovery, the Mortons conceded that they would be unable to show any negligence by Carnival in hiring or supervising De Oliveira. Instead, their complaint rested on a theory of a ship owner's absolute liability for assaults on passengers by its crew members.

The district judge determined that "those cases relied upon by the plaintiffs in support of a strict liability standard have been superseded or over-ruled" by *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), *overruled on other grounds,* 398 U.S. 375 (1970). The district judge concluded: "Therefore, a negligence standard of reasonable care under the circumstances is to be applied in determining the liability, if any, of Carnival Cruise Lines, Inc., in this case." Because the Mortons could present no evidence of any negligence by Carnival, the district judge granted summary judgment for Carnival. The Mortons now appeal.

II

We review summary judgments and questions of law de novo. *See Kruso v. International Tel. & Tel. Corp.,* 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied,* 496 U.S. 937 (1990). The parties agree that general maritime law applies. The Mortons claim that the district court erred in concluding that Carnival was not absolutely liable for an assault by a crew member. The Mortons contend that they should be allowed to proceed to trial.

We begin by examining the Ninth Circuit case on point. In *Pacific S.S. Co. v. Sutton,* 7 F.2d 579 (9th Cir. 1925), *cert. denied,* 269 U.S. 586 (1926), a teenage girl sued

a ship owner alleging that two crew members assaulted her during a voyage. She received a judgment against the ship owner and the ship owner appealed.

The court first noted the carrier-passenger relationship and its consequences:

> [B]y the sale of the ticket there arose a contractual relationship between the company and the passenger, to which relationship the law by its own force annexed certain implied obligations and duties to be observed and performed by the parties, respectively, toward each other. The contract of carriage made it the duty of the carrier to carry safely and to protect its passenger from violence and insult committed by its own servants.

7 F.2d at 580. The court then reviewed several authorities outlining the duties of a carrier before quoting the Washington Supreme Court:

> Appellant by the act of employment vouched for his deportment during the voyage. A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage. * * * As long as respondent was a passenger on appellant's ship, appellant owed him a *duty of absolute protection* from the assaults and aggressions of its servants, and the rule is well nigh universal that the carrier cannot plead as a defense that the servant acted outside the scope of his employment.

Id. (*quoting Marks v. Alaska S.S. Co.*, 127 P. 1101 (Wash. 1912)) (emphasis added; omission in original). This court then concluded: "It therefore follows that the court was right in treating the case as in contract, controlled by the general principles stated." *Id.* In the present case, there is no dispute that a carrier-passenger relationship existed between Carnival and Susan Morton. Under *Pacific,* then, Morton would be entitled to recover from Carnival simply by showing that the assault was committed by the crew member during the voyage.

Carnival, however, contends that the Supreme Court implicitly overruled *Pacific* in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In *Kermarec*, a visitor aboard a ship suffered injury as a result of the ship owner's negligence. The district judge instructed the jury that because the visitor was a licensee, the ship owner could be liable only if it actually knew of the hazardous condition and failed to warn the visitor of the hazard.

The Supreme Court stated the issue as "whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law." *Id.* at 630. The Court found no such distinctions in maritime law: "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632.

In isolation, this statement might support Carnival's contention and the district court's conclusion. But read in the context of the entire opinion, it does not necessarily reject the principle that a ship owner is absolutely liable for its crew members' assaults upon passengers.

In deciding *Kermarec*, the Court first noted that it "must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts." *Id.* at 630. The Court then focused on why the common law concept of the invitee/licensee distinction is inappropriate in admiralty law: "The distinctions which the common law draws between license and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." *Id.*

The Court found that such distinctions "originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect

entirely alien to the law of the sea." *Id.* at 631-32. The Court then concluded that eliminating these distinctions and applying a general standard of reasonable care made more sense for admiralty law.

Even with that conclusion, however, the court noted:

> This is not to say that concepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different. Membership in the ship's company, for example, a status that confers an absolute right to a seaworthy ship, is peculiar to the law of the sea.

Id. at 632 n.9.

In that note, the Court makes clear that "reasonable care under the circumstances" is not the universal standard of care to be provided aboard ship. A different standard may apply where it makes sense under maritime law.

Unlike the invitee/licensee distinction, the rule regarding absolute liability for crew members' assaults cannot be traced to obsolete concepts regarding real property and concepts of feudalism. Rather, it is a widely adopted rule that common carriers owe such an absolute duty to their passengers. *See, e.g., St. Michelle v. Catania,* 250 A.2d 874, 876-78 (Md. 1969) (carrier vicariously liable for assaults committed by employees even outside their employment during the contract for transportation); *Whittle v. Southern Bell Tel. & Tel. Co.,* 410 S.E.2d 575, 575 (S.C. Ct. App. 1991) (same); *Nazareth v. Herndon Ambulance Serv., Inc.,* 467 So.2d 1076, 1078-81 (Fla. Dist. Ct. App.) (same), *review denied,* 478 So.2d 53 (Fla. 1985). A leading torts treatise explains the general rule:

> Where the deliberate or willful wrong was not done to further the master's business the tendency has been to deny vicarious liability, but here too there have been many qualifications. The relationship between master and plaintiff may be such as to put on

> the master a duty of protective care that he may not delegate. Thus a carrier is liable to its passengers for assaults by employees prompted by purely personal motives.

5 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 26.9, at 53 (2d ed. 1986).

There is no doubt that the M/V Carnivale is a common carrier and that many of the concerns that led to the establishment of this rule are present on ships as well as trains, taxi cabs and other carriers.

Given this meaningful basis for the rule, we find that the Court's decision in *Kermarec* cannot be read to overrule it. The Court explicitly exempted unseaworthiness claims from its holding; we think it is clear that it implicitly exempted other "meaningful categories."

We are not persuaded by Carnival's argument that this circuit has adopted the *Kermarec* standard as all-encompassing through cases such as *Craig v. M/V Peacock*, 760 F.2d 953 (9th Cir. 1985). In *Craig*, the issue was whether or not the plaintiff was a seaman and thus entitled to the special protection. This court found he was not a seaman, and thus "the only duty owed him by Shipowners was that of exercising due care under the circumstances." *Id.* at 955. The court in that case was not confronted with an assault by a crew member; rather it simply had to decide whether the plaintiff was a seaman. If he was not, there was no dispute as to the standard of care owed him because his misfortune was the result of at most negligence and not any intentional acts by crew members.

We also are not persuaded by the contrary result reached in *Jaffess v. Saavedra*, No. 85 Civ. 7365 (MJL), 1988 U.S. Dist. LEXIS 3481 (S.D.N.Y. April 18, 1988). In that case, the district court found that a ship owner was not liable for an assault by a ship employee because the plaintiff did not show any negligence by the ship

owner. The court appeared to be bound by *Compagnie Generale Transatlantique v. Rivers,* 211 F. 294 (2d. Cir.), *cert. denied,* 232 U.S. 727 (1914), a case that, according to the district court, suggested that a plaintiff must show some fault by a ship owner before recovering for an assault by a crew member. As discussed above, we are bound by contrary Ninth Circuit precedent.

In conclusion, we hold that *Pacific* remains the law of this circuit. It is clear that we do not have the authority to set it aside; only the court sitting en banc may overrule a prior decision of the court. *See Montana v. Johnson,* 738 F.2d 1074, 1077 (9th Cir. 1984). Accordingly, the Mortons should be allowed to proceed to trial.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 90-315-WMB

SUSAN MORTON and WILLIAM MORTON,
Plaintiffs,
v.
JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 5, 1990]

I. BACKGROUND

This case arises out of an alleged rape on the high seas. Plaintiffs Susan and William Morton paid to take a luxury cruise upon a ship owned and operated by defendant Carnival Cruise Lines ("Carnival"). Plaintiffs allege that on the night of February 16, 1989, while Susan's husband, Bill, was in the ship's casino, crew member De Oliveira, who was the steward at the Morton's dining table, came to the Morton's cabin with a bottle of wine. Susan invited De Oliveira into the room so that he and Susan could drink the wine. Plaintiffs further assert that De Oliveira drugged the wine and, after Susan felt the effects of this drug, raped her. Susan failed to report this alleged rape to her husband when he returned to the cabin or to any of the authorities aboard the vessel during

the balance of the cruise. The sole factual issue in the case is whether the sexual contact between Susan Morton and De Oliveira was consensual. The parties agree that the matter is controlled by general maritime law.

On September 10, 1990, the Court issued an order with respect to the extent to which a shipowner can be held responsible for the tortious actions of its crew members. The Court held that the owner of a cruise line owes a duty of reasonable care under the circumstances to its passengers. *See e.g., Kermarec v. Compagnie Generale Transatlantique,* 79 S.Ct. 406 (1959), *overruled on other grounds, Moragne v. States Marine Lines, Inc.,* 90 S.Ct. 1772 (1970).

Currently before the Court is defendant Carnival's motion for summary judgment. Carnival asserts that it is entitled to summary judgment because there is no evidence that it breached its duty to exercise reasonable care under the circumstances. Carnival bases this motion on the ground that there are no material facts in controversy and that it is entitled to judgment in its favor as a matter of law. Plaintiffs do not dispute Carnival's assertion that plaintiffs have not, and cannot, present any evidence showing that Carnival breached its duty of reasonable care.

On November 6, 1990, the Court held a hearing on defendant Carnival's motion for summary judgment. During the hearing, plaintiffs' counsel asserted that defense counsel had obstructed plaintiffs' efforts to obtain sufficient discovery to oppose this motion. The Court ordered that a hearing would be held on the question of whether there was a basis for denial of Carnival's motion because plaintiffs had been precluded from an adequate opportunity for discovery. On November 15, 1990, plaintiffs filed with the Court a statement that they were withdrawing their request for additional discovery and that the Court should proceed with the determination of Carnival's motion for summary judgment.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510, (1986).

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Id.* at 2514. Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

A. *Evidence of Adequate Security*

Carnival correctly asserts that the instant case does not involve a question of forcible entry. Carnival submits an excerpt of the deposition of Susan Morton in which plaintiff clearly admits that she invited De Oliveira inside her cabin to drink wine. Plaintiffs neither respond to this argument nor dispute this evidence. Accordingly, whether Carnival maintained safe and secure premises is not at issue here.

B. *Evidence of Breach of Duty to Exercise Reasonable Care in the Selection, the Retention, or the Supervision of Employees*

Carnival argues that plaintiffs can show no triable issues of fact regarding whether Carnival knew or should have known that De Oliveira was inclined to commit a sexual assault. Carnival asserts, therefore, that there are no disputed issues of material fact with respect to whether it breached its duty to exercise reasonable care in the selection, the retention, or the supervision of De Oliveira.

1. *Selection of De Oliveira*

California law with respect to negligent hiring and retention of employees is set forth in the Restatement (Second) of Agency, Section 213, which provides in pertinent part,

> "A person conducting an activity through servants . . . is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons . . . involving risk of harm to others: . . ."
>
> Comment d reads in part: "The principal may be negligent because he has reason to know that the servant . . . , because of his qualities, is likely to harm others in view of the work . . . entrusted to him. . . .
>
> * * * *
>
> Liability results under the rule . . . , not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . ."

cited in *Underwriters Ins. Co. v. Purdie,* 193 Cal. Rptr. 248, 255 (Cal. App. 2 Dist. 1983).

Absent evidence of known character or past conduct indicating dangerous propensities, an employer cannot be held liable for negligent hiring. In *Boykin v. District of*

Columbia, 484 A.2d 560 (D.C. Ct. App. 1984), a teacher sexually assaulted a twelve-year-old girl who was blind, deaf, and dumb. Although the teacher had a clean record, plaintiff argued that the school should have foreseen that such conduct would occur because the teacher's position afforded him the opportunity for unsupervised, one-on-one contact with the child. The appellate court rejected this argument as a matter of law, stating,

> In a case such as this where the injury was caused by the intervening criminal act of a third party, the [employer] is liable for negligence only if the danger of the act "should have been reasonably anticipated and protected against." . . . Normally an actor in the [employer's] position has less reason to anticipate criminal misconduct than to anticipate negligence "since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."

Id. at 565, (citations omitted).

Carnival asserts that in the instant case there is no evidence that it failed to exercise reasonable care in hiring De Oliveira. De Oliveira did not have a prior criminal record nor was there any evidence of dangerous propensities. Once again, plaintiffs fail to offer evidence to dispute this argument.[1] Accordingly, the Court finds

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[1] As exhibit F to their opposition papers, plaintiffs submit an excerpt from the deposition transcript of Joseph Fields. Fields stated that he had no direct knowledge of whether Carnival did a background check on De Oliveria or of what types of checks Carnival generally performed on prospective employees. However, Fields further asserted,

> We hire people from 42 nations. Some people from impoverished countries where there are no police departments. There are no telephones. There are no numbers on their houses. It would be virtually impossible to do a background check on every individual that comes to Carnival Cruise Lines.

Plaintiffs' evidence does not imply that Carnival was negligent in hiring De Oliveira. The testimony of Joseph Fields states only

that there are no triable issues of fact with respect to whether Carnival breached its duty to exercise reasonable care in the selection of De Oliveira.

2. *Retention of De Oliveira*

Carnival submits that the contents of De Oliveira's personnel files provided no indication to defendant that De Oliveira might be dangerous. The file reveals that during his four year tenure with Carnival, De Oliveira received a total of four employee warnings. These citations, however, refer to work-related incidents, such as leaving dirty dishes out and refusing to pick up a glass he had dropped. Moreover, the file is devoid of evidence of prior unauthorized contact with passengers or entry into passenger areas. There is nothing contained in De Oliveira's employee record that should have put Carnival on notice that he was likely to commit rape.

Once again, plaintiffs neither address this argument nor submit any evidence to dispute the facts alleged by Carnival. The Court, therefore, finds that there are no triable issues of material fact regarding whether Carnival was negligent in retaining De Oliveira.

3. *Supervision of Employees*

Carnival offers excerpts from the depositions of Joseph Fields and Armand Colson to demonstrate that ship rules and regulations prohibit crew members from entering passenger areas, unless they must do so in the line of their specific duty. As a dining-room steward, De Oliveira had no reason to be in, and was, in fact, prohibited from

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that he had no knowledge about how Carnival investigated employees such as De Oliveira. Fields merely offered his opinion that it would be virtually impossible to conduct a detailed investigation. Moreover, plaintiffs do not submit evidence that De Oliveira had a prior criminal record or a vicious disposition of which Carnival should have been aware. Furthermore, as explained below, De Oliveira worked for Carnival for four years, during which time his employment history was very good.

being in, plaintiffs' cabin. Colson further stated that crew members remain under the command of the ship's officers even when off duty and are constantly monitored,

> The procedure that was in force at the time of this incident involved the normal rounds by the security officer, and to report or detain, as the case may be, crew members who are found in unauthorized areas. It doesn't matter what the unauthorized area is.
>
> * * * *
>
> They can be detained, basically put in jail on the ship.

Plaintiffs failed to address this argument and to offer any facts to dispute it. The Court, therefore, finds that there are no triable issues of material fact with respect to whether Carnival breached its duty of reasonable care under the circumstances in the supervision of De Oliveira.

III. CONCLUSION

The Court grants Carnival's motion for summary judgment on the grounds that there are no material issues of fact regarding whether Carnival breached its duty of reasonable care under the circumstances. There is no evidence that Carnival provided inadequate security or that Carnival failed to exercise reasonable care in the selection, retention, and supervision of De Oliveira.

DATED: Dec. 4, 1990

/s/ Wm. Matthew Byrne
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90 0315 WMB(T) x

SUSAN MORTON and WILLIAM MORTON,
Plaintiffs,

vs.

JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

[PROPOSED] JUDGMENT

[Filed Dec. 17, 1990]

Pursuant to the Court's ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, filed December 5, 1990,

IT IS HEREBY ORDERED that judgment be entered in favor of Defendant Carnival Cruise Lines, Inc. and against Plaintiffs Susan Morton and William Morton, and plaintiffs are to take nothing on their Amended Complaint.

DATED: December 13, 1990

/s/ William M. Byrne, Jr.
WILLIAM M. BYRNE, JR.
Judge, United States District Court

SUBMITTED BY: LILLICK & CHARLES

/s/ Kathy W. Stein
KATHY W. STEIN

DATED: December 10, 1990

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90 0315 WMB(T) x

SUSAN MORTON and WILLIAM MORTON,
Plaintiffs,

vs.

JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

NOTICE OF RULING AND ORDER

[Oct. 1, 1990]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

A hearing was scheduled and held on September 10, 1990 to determine the standard of care owed by Defendant Carnival Cruise Lines, Inc., to plaintiffs in this case, and Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs were represented by David Anderson of Anderson & Connell, who appeared by telephone. Defendant Carnival Cruise Lines, Inc., was represented by William Robinson and Kathy Stein of Lillick & Charles, who also appeared by telephone.

At the September 10, 1990 hearing, the court announced its disposition of both the determination of the standard of care, and the Motion for Partial Summary Judgment, and its reasons therefore, into the record. The court further ordered counsel for Carnival Cruise Lines, Inc., to prepare this formal order consistent therewith.

The court finds as follows:

Kermarec v. Compagnie General Transatlantique, 358 U.S. 625 (1959) establishes the standard of care owed by a vessel owner to all non-crewmembers. In *Kermarec*, the U.S. Supreme Court defined this standard as "reasonable care under the circumstances." 358 U.S. at 362. The *Kermarec* standard has been applied by other circuits in passengers cases, *Gibboney v. Wright*, 517 F. 2d 1054, 1059 (5th Cir. 1975); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1975); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983); *Monteleone v. Bahama Cruise Line, Inc.*, 538 F.2d 63, 65 (2d Cir. 1988); *Muratore v. M/S. Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d. 416, 421 (5th Cir. 1986), and by the Ninth Circuit, *Craig v. M/V Peacock*, 760 F.2d 953 (9th Cir. 1985). This court finds that those cases relied upon by the plaintiffs in support of a strict liability standard have been superseded or over-ruled by *Kermarec*. Therefore, a negligence standard of reasonable care under the circumstances is to be applied in determining the liability, if any, of Carnival Cruise Lines, Inc., in this case.

Plaintiff's Motion for Partial Summary Judgment is denied.

Respectfully Submitted,

LILLICK & CHARLES

DATED: September 26, 1990

/s/ William L. Robinson
WILLIAM L. ROBINSON
KATHY W. STEIN
Attorneys for Defendant,
CARNIVAL CRUISE LINES, INC.

IT IS SO ORDERED.

/s/ William M. Byrne, Jr.
WILLIAM M. BYRNE, JR.
Judge, United States District Court

DATED: Oct. 1, 1990

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90 0315 WMB(T) x

SUSAN MORTON and WILLIAM MORTON
Plaintiffs,

vs.

JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

DEFENDANT CARNIVAL CRUISE LINES, INC.'S, ANSWER TO AMENDED COMPLAINT

[Filed Apr. 13, 1990]

DEFENDANT CARNIVAL CRUISE LINES, INC., (hereinafter "CARNIVAL") for itself alone, hereby responds to Plaintiffs' Amended Complaint as follows:

* * * *

TENTH AFFIRMATIVE DEFENSE

27. The alleged assault did not occur in the course and scope of Defendant OLIVEIRA's employment with CARNIVAL and was done, if at all, without the knowledge and consent of CARNIVAL and solely out of the personal motivation of Defendant OLIVEIRA, and therefore plaintiffs cannot recover against this defendant.

* * * *

MOTION FILED
JUL 19 1993

No. 92-1987

Supreme Court, U.S.
JUL 19 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUSAN MORTON AND WILLIAM MORTON,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 92-1987

In the Supreme Court

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OCTOBER TERM, 1992

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUSAN MORTON AND WILLIAM MORTON,
Respondents.

MOTION BY THE INTERNATIONAL COUNCIL OF CRUISE LINES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The International Council of Cruise Lines ("ICCL") respectfully moves this Court for leave to file the accompanying *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner has consented to leave for this purpose, but Respondents have not. Therefore, leave to file must be sought pursuant to Supreme Court Rule 37.2.

1. NATURE OF AMICUS' INTEREST

The ICCL is a domestic non-profit membership association of twenty passenger cruise lines whose members operate in excess of eighty vessels calling at numerous ports in the United States. Passenger cruises have become increasingly popular with the

American public, and represent a substantial and growing segment of the vacation and leisure-time market.[1] These cruise vessels embark and disembark passengers at major ports on the Atlantic, Gulf and Pacific Coasts, and repeatedly pass through waters of different jurisdictions during their voyages.

The Petition for Writ of Certiorari presents substantial and important questions concerning the legal standard of care owed by cruise lines to their passengers, and concerns all members of the ICCL. It is a matter of great practical concern to the cruise lines that the standard for imposing liability not differ depending upon which jurisdictional waters are being navigated. A uniform standard for determining liability is imperative.

2. RELEVANT MATTERS RAISED BY THIS AMICUS BRIEF WHICH MAY NOT BE ADDRESSED BY THE PARTIES.

The ICCL believes there are important considerations of national uniformity of the maritime law raised by the Petition for Writ of Certiorari which directly impact the passenger cruise industry in the United States. In its decision below the Ninth Circuit held that a cruise line is absolutely liable to a passenger for a crew member's intentional tort even though it was committed outside the course and scope of employment. The ICCL fully supports Petitioner's reasons for granting the Writ of Certiorari on whether that ruling is correct. As Petitioner asserts, the Ninth Circuit's decision is a significant departure from the established application of this Court's doctrine of respondeat superior liability in the maritime law. *New Jersey Steamboat Co. v. Brockett,* 121 U.S. 637 (1887).

The Brief that this *Amicus* seeks leave to file addresses the further question raised by Petitioner — whether, in the absence of respondeat superior liability, the court below erred in imposing a

---

[1]Statistics compiled by the Cruise Lines International Association indicate more than 4 million passengers embarked on cruises in North America during 1992. This represents a significant increase from 1.4 million passengers in 1980. It is estimated that by the year 2000 over 8 million passengers will embark on such cruises.

strict liability standard on cruise lines, rather than a negligence standard of reasonable care under the circumstances. The ICCL's Brief presents the cruise industry's perspective in seeking resolution of this question. The issue is one of great practical concern to the cruise line members who, at least since this Court's decision in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), have been guided by the principle that their liability to passengers is governed by the practical standard of reasonable care under the circumstances.

The ICCL believes that the decision below is contrary to the principle established in *Kermarec* that a vessel owner may be liable to an injured passenger for its negligence but is not liable without fault. The rule of *Kermarec* has proven over time to be flexible with its contours being refined on a case-by-case basis by the lower federal courts. Each member of the ICCL owns or operates cruise vessels traversing the waters of multiple federal jurisdictions and has an immediate, substantial interest in establishing uniformity on this fundamental issue under the maritime law.

Respectfully submitted,

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No. 92-1987

In the Supreme Court

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OCTOBER TERM, 1992

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUSAN MORTON AND WILLIAM MORTON,
Respondents.

BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below held a cruise line to a standard of strict liability for an intentional tort committed against a passenger by a crew member outside the course and scope of employment, and declined to apply the legal standard of reasonable care under the circumstances established by this Court's prior decisions. See *Leathers v. Blessing*, 105 U.S. (15 Otto) 626 (1882); *The Admiral Peoples*, 295 U.S. 649 (1935); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

Except for liability arising from application of the doctrine of respondeat superior, it is well established in the maritime law that a cruise line is not liable to an injured passenger without a finding of negligence. The only class of injured persons entitled to recover from a shipowner on principles of liability without fault are

seamen who are granted the absolute right to a seaworthy ship. *The OSCEOLA*, 189 U.S. 158 (1903); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). In *Kermarec*, this Court recognized that seamen, by virtue of the hazards and risks of their work, were distinctly different from passengers, licensees or invitees who were all owed a single, unified duty of reasonable care. 358 U.S. at 630 n. 9.

The rule of *Kermarec* has proven practical, and its more precise contours have been shaped and refined in maritime passenger cases by the federal courts. As it has evolved, the rule allows courts to tailor the degree of care required as reasonable to match the extent to which the maritime circumstances of the risk differ from those encountered in daily shoreside life. *Rainey v. Paquet Cruises, Inc.*, 709 F. 2d 169 (2d Cir. 1983).

The decision below conflicts in principle with the rule of *Kermarec*, and its progeny, in imposing strict liability on a shipowner for injury to a passenger. The conflict will cause confusion in the federal courts, and is a matter of great practical concern to the passenger cruise industry. This Court should grant the Writ of Certiorari to correct this conflict and ensure national uniformity on this fundamental aspect of maritime law.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CORRECT THE DECISION BELOW WHICH CONFLICTS IN PRINCIPLE WITH ITS EARLIER DECISION IN *KERMAREC*.

The decision below arises out of an alleged assault to a passenger on board a cruise line vessel, and is therefore governed by the federal maritime law, not by the law of the states. *Leathers v. Blessing*, 105 U.S. (15 Otto) 626 (1882); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, *rehearing denied* 359 U.S. 962 (1959). The national interest in promoting the uniformity of the maritime law was originally set forth in *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874), and is based on Article III, Section 2 of the United States Constitution,

extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction".

The nature of maritime commerce requires that the substantive laws regulating the rights and responsibilities of shipowners and their passengers not vary according to the jurisdiction in which vessels operate. The paramount importance of establishing and maintaining uniformity of the maritime law has repeatedly been endorsed by this Court. See e.g. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Romero v. International Terminal Operating Co.*; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-402 (1970).

The member cruise lines of the ICCL all operate vessels which navigate in the waters of different federal jurisdictions. They carry passengers to and from United States seaports. In the event of injury to passengers, the cruise lines are subject to claims and suits under the maritime law in different jurisdictions. The standard for determining their legal liability for injuries is of great importance and concern to the cruise lines.

In its decision below, the Ninth Circuit adopted a standard imposing absolute, or strict, liability on the cruise line to a passenger for an employee's intentional tort committed outside the course and scope of employment. In so ruling, the Ninth Circuit declined to follow the standard of reasonable care most recently expressed by this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), as the singular and uniform duty owed by a shipowner to all non-seamen personnel aboard the vessel. The Ninth Circuit adopted a different standard, one of absolute liability, on the grounds that this was a "meaningful category" of cases exempt from the rule of *Kermarec*. (See Appendix to Petition at 7a).

In exempting this case from the reasonable care standard, the Ninth Circuit relied on this Court's comment in *Kermarec*, which acknowledged the well-established exception to a vessel's duty of reasonable care in the case of seamen who are owed the absolute warranty of seaworthiness. 358 U.S. at 632 n.9. The Ninth Circuit held that this express exception recognized for seamen allowed a

further, implicit exception to the general rule for passengers injured by the intentional tort of a crew member. This exception is not supported by the decisions of this Court and is not warranted. Except for a shipowner's vicarious liability arising under the doctrine of respondeat superior, cruise lines have historically been held liable for a passenger's injury based on proven negligence.

The decision below, therefore, conflicts with the principle of *Kermarec*. It imposes absolute liability on a shipowner for a class of persons who heretofore have always been held to be owed the practical and uniform duty of reasonable care under the circumstances.

Passengers have never been owed the duty of a "seaworthy" vessel, the breach of which gives rise to absolute liability.[1] See *The OSCEOLA*, 189 U.S. 158 (1903); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The corollary to this rule is that a cruise line is not an absolute insurer of the safety of its passengers. *City of Panama*, 101 U.S. 453, 462 (1879). This Court's opinion in *Kermarec*, expressly recognized that the plaintiff-guest was neither a member of the ship's crew, nor of the expanded class of workmen performing work traditionally done by the crew, both of whom were entitled to the benefit of the unseaworthiness doctrine. 358 U.S. at 629.[2] Seamen are owed the absolute duty of a seaworthy vessel because of their historical status as wards of admiralty and the hazards of their employment. See *Mahnich v.*

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[1] The doctrine of seaworthiness in maritime personal injury law is a term of art respecting a shipowner's legal duty, and must be distinguished from the ordinary meaning of the word, namely, whether a vessel is generally fit to travel in on the open sea. Webster's New World Dictionary, Third College Edition, at 1211 (1991).

[2] The unseaworthiness remedy that was judicially extended to longshoremen when performing work traditionally done by seamen was abrogated by Congress in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. See 33 U.S.C. § 905(b).

Southern S.S. Co., 321 U.S. 96, 103-104 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93-94 (1946).[3]

The principle teaching of *Kermarec* extended the duty of reasonable care to all non-seamen, and eliminated any distinctions in that duty based on status as guest, licensee or invitee. The legal effect of the decision below is to impose liability on a cruise line operator for a passenger's injury as if the passenger were a seaman owed the absolute warranty of seaworthiness. This is contrary to the general maritime law as developed by this Court's decisions.

The exception from the rule of *Kermarec* expressed in the decision below upsets the body of maritime law carefully developed by the federal courts following *Kermarec*. Although subsequent decisions often entertained semantic descriptions of the *Kermarec*-duty as the "highest degree of care", "very high degree of care", or "extraordinary vigilence", there is, in essence, only one degree of care owed to passengers: "reasonable care under the circumstances".[4] The nature of that duty was more precisely defined by the Second Circuit Court of Appeals in *Rainey v. Paquet Cruises, Inc.*, 709 F. 2d 169 (2d Cir. 1983) in which it was held that the degree of care required of the cruise line as reasonable must take into account the maritime circumstances of the risk and whether that risk differs from those encountered in daily shoreside life.[5] The rule of *Kermarec*, as applied and refined

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[3]For a succinct discussion of the historical development of unseaworthiness liability and its complete divorcement from negligence concepts, see *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543-550 (1960).

[4]See e.g. *Moore-McCormack Lines v. Russak*, 266 F. 2d 573 (9 Cir. 1959); *Maibrunn v. Hamburg-American SS Co.*, 77 F. 2d 304 (2 Cir. 1935); *Allen v. Matson Navigation Co.*, 255 F. 2d 273 (9 Cir. 1958).

[5]The holding in *Rainey* has been followed by other Circuit Courts of Appeal in numerous decisions. See e.g. *Muratore v. M/S SCOTIA PRINCE*, 845 F. 2d 347 (1 Cir. 1988); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F. 2d 416 (5 Cir. 1986); *Beard v. Norwegian Caribbean Lines*, 900 F. 2d 71 (6 Cir. 1990); *Orian v. Milstead*, 473 F. 2d 948 (8 Cir. 1973); *Keefe v. Bahama Cruise Line, Inc.*, 867 F. 2d 1318 (11 Cir. 1989).

by the lower federal courts, has produced a practical and uniform standard to measure cruise line liability to passengers. The decision below conflicts with the principles of *Kermarec* and a well-established body of maritime law. For this reason, this Court should grant the Writ of Certiorari and correct the decision below.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ESTABLISH UNIFORMITY UNDER THE MARITIME LAW ON THE IMPORTANT QUESTION OF THE STANDARD OF LIABILITY OF CRUISE LINES TO PASSENGERS.

At least since 1959, when this Court established the rule of *Kermarec*, cruise lines have been guided by a practical and uniform standard of liability to all non-seamen defined as the duty of reasonable care under the circumstances. The decision below departs from this uniform standard and has caused consternation among the member cruise lines of this *Amicus*. This concern is both academic and practical. In theory, this absolute liability will apply only to the Ninth Circuit, while the reasonable care standard will apply in the other circuits. Since the members' cruise vessels embark passengers at various ports in the United States and engage in voyages touching numerous jurisdictions, the cruise lines are, as a practical matter, subject to disparate liability standards. The confusion and uncertainty created by the decision below justifies granting the Writ of Certiorari in order to establish a national uniform standard for cruise line liability to passengers.

CONCLUSION

The International Council of Cruise Lines respectfully urges the Court to grant the Petition for Writ of Certiorari to correct the decision below, which conflicts in principle with the precedents established by this Court, and establish a uniform rule of maritime law.

Respectfully submitted,

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No. 92-1987

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BRIEF FOR RESPONDENTS SUSAN MORTON AND WILLIAM MORTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court below correct in holding that when a paying passenger traveling aboard an ocean common carrier's vessel is raped by a member of the crew into whose care the common carrier has placed her for safe carriage, the resulting damages are to be borne by the common carrier rather than the victim?

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IN THE

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CARNIVAL CRUISE LINES, INC.,

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SUSAN MORTON and WILLIAM MORTON,

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BRIEF FOR RESPONDENTS SUSAN MORTON AND WILLIAM MORTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS BELOW

The order of the United States Court of Appeals for the Ninth Circuit dated March 17, 1993, denying rehearing and rejecting the suggestion of a rehearing *en banc* is reproduced as an Appendix to this brief.

STATEMENT OF THE CASE

By way of supplementation to Petitioner's Statement of the case, Respondent would add:

There are no American flag vessels offering any cruises from any U.S. port to any foreign port or ports, and this has been the case for many years (Declaration of Ted Parsons, CR67).

When Susan Morton was raped, there existed between Petitioner Carnival Cruise Lines, Inc. and Respondents Morton a relationship of common carrier and passengers respectively (Carnival's Response to Request for Admissions, CR 67).

V. Armand Colson became Carnival's manager in June, 1988. He is "involved in literally every claim that comes across Carnival Cruise Lines." During his service of some 2¼ years with Carnival before the taking of his deposition in September 1990, he had been involved in approximately 15 claims of passengers alleging physical contact by crewmembers, of which 3 were pending and the rest were unfounded and closed (Colson Deposition 9/6/90, p. 51, l. 17-21; p. 52 l. 1-2; p. 53 l. 8-10, 16-22).

In the trial court, Respondents did not claim that Carnival was independently at fault separately and apart from the misconduct of its crewmember-employee, but Respondents did contend that Carnival breached its duty of care, namely its absolute responsibility to keep its passengers free from assault by the crewmembers into whose hands Carnival had delivered the passengers for safe carriage.

Following the Ninth Circuit's reversal of the trial court, Petitioner sought rehearing and suggested rehearing *en banc*. The petition for rehearing was denied, and no judge of the court requested a vote on the suggestion for rehearing *en banc*, which was therefore rejected, Resp. Appx. A.

SUMMARY OF ARGUMENT

In holding Carnival responsible for the misconduct of its crewmember-employee, the Ninth Circuit scrupulously adhered to the precedents of this Court which have governed the obligations of common carriers to paying passengers for over one hundred years, *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887); *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891). This Court *denied* certiorari when presented with an identical matter from the Ninth Circuit, *Pacific S.S. Co. v. Sutton*, 7 F. 2nd 579 (9th Cir. 1925), *cert. den.* 269

U.S. 586 (1926), (Carrier absolutely liable for crewmember rape of passenger).

The rule of absolute common carrier responsibility for misconduct of the personnel of its conveyance against paying passengers established by these cases has never been changed. It was unaffected by *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), which simply determined a "floor" or basic minimum duty owed by shipowners to everyone, and did not involve a paying passenger, a common carrier, crewmember misconduct, or the rights and obligations relating thereto at all. *Kermarec* expressly recognized that there are persons holding status in various "meaningful categories" to whom special rules apply under maritime law, 358 U.S. 632 n.9. One such category is paying passengers.

Not only was the rule of carrier responsibility unchanged by *Kermarec,* but also it *should not* be changed, for the rule is sound as a matter of policy. All of the cruise ships plying between U.S. and foreign ports are foreign-flag vessels. The millions of U.S. citizens who are induced to travel aboard these vessels lose the protection, deterrent effects, and investigatory aid of the U.S. criminal justice system and law enforcement authorities as soon as the vessels leave U.S. waters. Passengers are wholly dependent upon the carrier and its employees for their safety and have no independent authority available to investigate any misdeeds. As a practical matter they will have no redress in the absence of a rule of absolute carrier responsibility for crewmember assaults.

The rule is likewise sound as a matter of policy because enterprise liability is particularly appropriate in cases of intentional crewmember misconduct. Fortunately such occurrences are rare. The shipowners derive vast profits from the U.S. traveling public and can readily insure against responsibility for the few incidents which do occur. However, there is no insurance by which passengers can protect themselves against the damages they will suffer if they are among the unlucky few who become the victims of atrocities such as rape.

In any event, this case is of insufficient national importance to warrant review by this Court. While many people take cruises, hardly any even claim that they have encountered crewmember misconduct, and of those, it appears that only about 10-15 passengers are actually victimized to any degree in an entire year.

REASONS FOR DENYING WRIT OF CERTIORARI

I. The Ninth Circuit Followed The Rulings Of This Court Precisely In Holding That When A Paying Passenger Traveling Aboard An Ocean Common Carrier's Vessel Is Raped By A Member Of The Crew Into Whose Care The Common Carrier Has Placed Her For Safe Carriage, The Resulting Damages Are To Be Borne By The Carrier Rather Than The Victim.

For over 100 years, it has been clearly established that a common carrier is absolutely liable for injuries wrongfully inflicted upon paying passengers *by carrier personnel.* In *New Jersey Steamboat Co. v. Brockett,* 121 U.S. 637 (1887), that basic rule was announced.

Carnival puts a misleading interpretation on what this Court actually said in *Brockett* by asserting that the case stands for the proposition that a common carrier's responsibility for an assault upon a passenger by a crewmember depends upon whether the assault was committed in the scope of the crewmember's employment. A careful reading of the case discloses that this is incorrect.

In *Brockett,* this Court first discussed the *general* rule of employer responsibility, which imposes liability for an employee's act even if unauthorized or forbidden by the employer, when the employee is acting within the scope of employment. Very significantly, this Court next stated,

> "The principle is *peculiarly* (emphasis added) applicable between carriers and passengers, for, as held by the same court in *Stewart v. Brooklyn and C. R.R. Co.,* 90 N.Y. 591, '. . . a common carrier is bound, as far as practicable, to

> protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and *undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.*' "

(Emphasis added.)

Nothing could be more clear or more concise: injury by third parties, negligence required; injury by crewmember, absolute carrier responsibility.

In pointing out the *peculiar* application of the principle of employer responsibility to common carriers, this Court was indicating that common carriers are *absolutely* responsible for misconduct of their employees against passengers, even when *not* acting within the scope of their employment. Otherwise there would be nothing *peculiar* about a common carrier's responsibility if it were confined to the general rule applicable to other employers under which the employee must be acting within the scope of his employment. The reference to the absolute nature of the carrier's responsibility would likewise be meaningless. What this Court plainly meant was that during the journey, the carrier is absolutely liable for misconduct of its personnel manning the conveyance in which the passenger is being transported, be it ship, train, or otherwise, even if the employee is acting *outside* the scope of his employment.

The reference to responsibility for the misconduct of servants "engaged in executing the contract" affords no escape hatch to Carnival either. This clearly connotes only the carrier's employees manning the conveyance during the journey, and does not imply that they must be actively engaged in some specific task for the carrier to be absolutely responsible for their misconduct. The fact that the miscreant in this case was not in the midst of a specific work shift in the dining salon is of no avail to Carnival. As a crewmember of a ship at sea, the assailant was at all times in the service of the vessel, present for the sole purpose of executing the contract of carriage in conjunction with his shipmates, and bound at all times to be vigilant to act for the safety of the vessel and the care and protection of the passengers.

If he had seen a passenger fall overboard; if he had discovered a leak in the hull; if he had come upon a fire, he was bound to respond. At whatever time and wherever he was, he was under obligations to contribute to the fulfillment of the contract of carriage even if at any given moment they consisted only of being observant or available to act. In short, he was on duty every moment of every day throughout the voyage, engaged in the service of the vessel in executing the contract.

A review of *Stewart, supra,* the New York case cited by this Court as authority for the rule announced, makes it abundantly clear that no scope of employment restriction was intended. Headnote 2 of *Stewart* at 90 N.Y. 588 states,

> "The rule relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, does not apply between a common carrier of passengers and a passenger."

As the court in *Stewart* observed,

> "In the present case the master had undertaken to transport the plaintiff safely. He was injured while on the defendant's car by the act of the agent to whom the defendant had entrusted execution of the contract. It is the defendant's failure to carry safely that constituted the breach, and it is no defense to say that that failure was the result of the willful or malicious act of the servant."

Id. at 592.

A subsequent decision makes it indisputable that the rule of absolute responsibility announced in *Brockett* was not qualified by any scope of employment restriction.

The rule of absolute common carrier liability was brought ashore and again expressed by this Court in *New Orleans & N.E.R. Co. v. Jopes,* 142 U.S. 18 (1891), wherein a train passenger had been shot by a conductor. Said the Court,

> "... the carrier is liable for every conceivable wrongful act done to a passenger by its ... employees while they are engaged in transporting him, no matter how willful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done in furtherance of the carrier's business (citations omitted)."
>
> "In most cases in which an injury done by an employee has been the cause of the litigation, the defense has been, not that the act of the employee was lawful, but that it was a wanton and willful act on his part, outside the scope of his employment, and therefore something for which his employer was not responsible; and if the act was of that character, the general rule is that the employee alone, and not the employer, is responsible. But owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful and outside the scope of the employment."

142 U.S. at 26–27.

Moreover, when an ocean common carrier brought an identical Ninth Circuit case of crewmember rape to this Court, certiorari was denied, *Pacific S.S. Co. v. Sutton,* 7 F.2d 579 (9th Cir. 1925), *cert. den.* 269 U.S. 586 (1926). Female passengers are no less deserving of redress for the atrocity of rape today than they were then. Carnival's Petition should meet with the same response which this Court gave to the carrier in *Sutton.* It should be denied.

II. The Standard Of Reasonable Care Applied In Maritime Negligence Cases Was Neither Applicable To Nor Undermined By The Ninth Circuit's Decision In This Case Of Intentional Injury To A Paying Passenger By A Crewmember Aboard A Common Carrier's Vessel.

Brockett and its progeny have never been overruled or modified, certainly not by *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). In *Kermarec,* a crewmember's friend aboard

defendant's vessel for a social visit, was injured when he fell on a defective canvas runner while descending a stairway. The trial court applied state law, with its old common law distinctions of different degrees of care owed to invitees, licensees, and trespassers, and set aside a jury verdict in the plaintiff 's favor on the grounds that the plaintiff had not proven the shipowners' actual knowledge of the dangerous condition, which under New York law as a licensee he was required to do.

The issue addressed by this Court was simply whether the presence or absence of negligence on the part of the shipowner should be determined under the old common law distinctions between invitees, licensees, and trespassers with their fine-spun sub-classifications and attendant confusion, or under a simple rule of reasonable care under the circumstances toward all persons lawfully aboard. Said this Court, "Stated broadly, the decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law." *Kermarec* was just a garden variety slip-fall negligence case, and this Court chose the simple rule for *maritime negligence* cases, rather than adopting the status distinctions used to determine the degree of care owed in *common law negligence* cases.

Kermarec had nothing to do with a paying passenger. *Kermarec* had nothing to do with a passenger at all.

Kermarec had nothing to do with an injury inflicted by a crewmember. *Kermarec* had nothing to do with a crewmember at all.

Kermarec had nothing to do with an intentional injury. The common carrier's absolute responsibility for intentional injuries of paying passengers by crewmembers was not even remotely involved, much less discussed. Nowhere in *Kermarec* is there the slightest intimation that this Court intended to abolish the carrier's existing absolute responsibility in a case of intentional mistreatment of passengers by crew, which is not a negligence case at all. This Court merely adopted a simple rule of reasonable care for maritime *negligence*

cases, rather than the complex status-dependent rules traditionally applied in shoreside *negligence* cases.

When Carnival's presentation is analyzed, it is evident that it comes down to the following proposition: This Court said in *Kermarec* that a shipowner does owe to *all* who are on board his vessel a duty of reasonable care under the circumstances. By affirmatively imposing at least this minimum obligation upon shipowners in favor of *all* persons, this Court intended to take away (according to Carnival) all greater obligations which already existed in favor of *some* persons; to overrule (without bothering to say so) every precedent of this Court which had previously imposed greater obligations in favor of *some* persons; and to disapprove all lower court progeny to that effect as well.

This is demonstrably absurd, but this is exactly what Carnival is saying: by *granting* a minimum right to all, this Court purportedly meant to take away other rights from some. Nowhere does this Court say such a thing in *Kermarec*. This Court is perfectly capable of saying what it intends, especially if it intends to overrule fundamental principles of maritime law.

In any event, by a few simple illustrations, the fallacy of Carnival's contention is readily exposed. For example, when *Kermarec* was decided, it was already well established since *The Osceola*, 189 U.S. 58 (1903) that seamen injured aboard a vessel by unseaworthiness had an absolute right to recover damages from the shipowner, irrespective of the presence or absence of shipowner's negligence. Even in the absence of negligence or unseaworthiness, a seaman injured aboard a vessel had an absolute right to recover maintenance and cure from the shipowner. Masters also had an absolute right to recover damages for unseaworthiness, as well as maintenance and cure. So did ships officers. So did persons employed aboard by shipboard concessionaires.

There was also absolute liability to various categories of transient vessel visitors for injuries caused by unseaworthiness, *Seas*

Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1946), such as longshoremen, ship repairmen, marine carpenters, marine surveyors, ship's pilots — the list could go on and on.

Shipowner's absolute liability likewise existed to paying passengers for injuries caused by intentional misconduct of crewmembers. *New Jersey Steamboat Co. v. Brockett, supra.*

By granting a negligence cause of action in *Kermarec* to *everyone* injured aboard a vessel, did this Court intend to abolish all other rights of recovery which it had previously created under general maritime law over the course of many decades? To take away the unseaworthiness vehicle from the many persons then entitled to use it? To strip maintenance and cure from seamen? To destroy passengers rights of redress if brutalized by vessel crewmembers? Of course not. Congress took away some recovery rights from some categories of injury victims by the 1972 amendments to 33 U.S.C. § 905(b) of the Longshoremen's and Harborworker's Compensation Act, but this Court never did. And no one, not this Court, not Congress, not anyone, ever took from paying passengers the special rights which they had, and have to this day — to recover damages from the shipowner if they are raped, assaulted, or otherwise intentionally mistreated by the shipowner's crewmembers in whose care they are traveling.

In fact, as recognized by the Ninth Circuit, this Court in *Kermarec* plainly indicated that the minimum duty of care owed by a shipowner to everyone was not all-encompassing, and that greater duties were owed to persons holding status in various "meaningful categories," *Id.* 358 U.S. at 32 n.9. This Court referred to the status of seamen as simply an example, making obvious the existence of other "meaningful categories" such as paying passengers.

Petitioner's presentation is grossly inaccurate in asserting that the Ninth Circuit purported by its ruling to make carriers absolutely liable for *all* mishaps suffered by passengers, and thereby disrupted the uniformity of maritime law. The Ninth Circuit did no such thing.

It simply held that a common carrier is absolutely liable for a passenger's injury in only one narrow situation: when the injury was the result of an assault upon the passenger by a member of the crew into whose care the carrier had placed her for safe carriage. This has nothing to do with a trip-fall such as in *Kermarec,* tumbles over bar stools, stubbing of toes on protruding screws, or the sundry other unintended mishaps giving rise to the assortment of cases referred to by Carnival. Carnival's attempt to manufacture a non-existent conflict between *Kermarec* and other unintentional injury cases on the one hand, and the Ninth Circuit's decision in this case of crewmember assault upon a passenger, mixes the proverbial apples and oranges, and affords no basis for granting *certiorari.*

III. The Ninth Circuit's Decision Is In Harmony With The Decisions Of Other Circuits Dealing With Intentional Misconduct Of Common Carrier Employees Against Passengers.

In the Second Circuit, in *The Minnetonka,* 146 Fed. 509 (2nd Cir. 1906), the court applied the rule of *Brockett* in holding that the shipowner would be absolutely liable for intentional wrongdoing of a crewmember against a passenger, in that case theft of a passenger's jewelry. The court made short shrift of the shipowner's attempt to disclaim responsibility for intentional misconduct of a crewmember as being outside the scope of his employment.

The court illustrated the injustice of such a rule as follows:

> "If the porter of a sleeping car, employed to guard the car while the passengers sleep, should himself fall asleep or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable, but if the guardian himself turned pickpocket, and rifle the pockets of the passengers, the company would not be responsible for his acts."

The Court rejected such an absurd proposition, observing,

> "The carrier selects his own servants and agents, and, we think, he must be held to warrant that they are trustworthy as well as skillful and competent."

Likewise, the rule of absolute carrier responsibility for crew misconduct against passengers has the approval of the Fifth Circuit. In *Tullis v. Fidelity and Casualty Company of New York,* 397 F. 2d (5th Cir. 1968), the court noted,

> "The principles involving liability to passengers differ little from those in use ashore. The liability is negligence with the *only apparent exception being the unconditional responsibility of the carrier for the misconduct of the crew toward the passengers.*"

(Emphasis added).

Absolute responsibility for intentional misconduct of crewmembers is imposed in the First Circuit as well. In *Muratore v. M/S SCOTIA PRINCE,* 845 F.2d 347 (1st Cir. 1988), the plaintiff passenger was subjected to humiliating remarks and rude pranks by shipboard photographers, and suffered emotional distress. In affirming the district court's finding of carrier *liability* for intentional misconduct of these crewmembers against plaintiff, the First Circuit observed, "As correctly stated by the district court, a maritime carrier has 'an unconditional responsibility for the misconduct of its people toward the passengers.' " 845 F.2d at 353. The court later noted that the carrier had no actual or constructive knowledge of the crewmembers' misconduct, did not ratify it, had not encouraged it; and that there was no evidence that there was any prior "track record" whereby a reasonably conscientious carrier would have had reason to suspect that they would harass passengers on the voyage, *Id.* at 355, so it is clear that *liability* was imposed on the carrier, not on negligence grounds, but on the basis of absolute carrier liability for crewmember misconduct.

The First Circuit then turned to the topic of the amount of compensatory *damages* awarded. At this point, the court considered *Kermarec,* but only for the purpose of evaluating the *amount* awarded by determining the extent to which the treatment which the passenger received deviated from the level of courtesy and consideration to which she was entitled, using "reasonable care under the

circumstances" to establish that level. The carrier apparently contended that the district court had awarded an excessive amount of damages by applying the "highest degree of care" standard found in some maritime passenger cases, thus setting the level of expectable courtesy too high, in turn leading to an excessive discrepancy between the courtesy due and the treatment received, with assessment of correspondingly excessive damages. The First Circuit determined that the trial court had properly used the *Kermarec* reasonable care standard to measure *damages* and rejected the carrier's contention. The important point is that *Muratore* is an absolute liability case, and that the court only applied *Kermarec* in measuring the *amount of damages*.

The leading maritime treatises likewise uniformly agree that there is absolute responsibility for misconduct by a carrier's crewmember employees.

> "Rape, indecent assault or molestation of a passenger by an employee in the service of the ship is contrary to the duty of the carrier to carry safely and to protect the passenger from harm."

Norris, Maritime Personal Injuries, 3rd, P. 78.

> "If the passenger is harmed by an employee in the service of the ship in contravention of the duty of safe carriage, the carrier cannot plead as a defense that the employee acted willfully, maliciously and outside the scope of his employment."

Norris, supra, at page 78.

To the same effect is *Gilmore and Black, Law of Admiralty,* 2d, p. 23, note 77, referring to

> "the unconditional responsibility of the carrier for misconduct of his people toward the passengers."

Also in accord is *Schoenbaum, Admiralty and Maritime Law,* (1987) page 128:

> "The shipping line is liable without negligence if the injury to a passenger is caused by the intentional misconduct of the crew."

The rule of absolute carrier responsibility for intentional crew misconduct is also well summarized by 14 Am. Jur.2d §908, with a host of authorities set forth in the accompanying notes:

> ". . . it has been held in some of the earlier cases that an act not within the line of the employee's duty or the real or apparent scope of his authority cannot fasten upon the carrier liability for injury resulting therefrom, unless authorized or ratified by the carrier.
>
> "In many cases, however, including later ones on the subject, the liability of a common carrier for tortious acts of its employees causing injury to passengers has not been predicated upon or limited to the doctrine of *respondeat superior* but has been based upon the legal obligation imposed upon the carrier to protect its patrons while in its charge from willful or negligent injury. Under this theory, which is now widely accepted, it is of no consequence when the wrong is committed by the carrier's employee that the act bears no connection or relation with the duties of such employee to the carrier and is not committed as an incident to the discharge of any duty, but is entirely outside the scope of his employment or even in disobedience of the carrier's orders. It has been said pursuant thereto, that a carrier of passengers, as part of its contract of carriage, must protect its passengers from all tortious acts of its employees, and for a breach of this contract, however, occasioned, a passenger may recover. Accordingly, under this theory a carrier is liable for injuries sustained by a passenger as a result of the willful, wanton, or malicious acts of its employees, including assaults by its employees upon the person of a passenger, even though not authorized by the carrier and outside the line of duty of the employee or the scope of his employment. Insofar as the liability of a carrier for the tortious acts of its employees is concerned, the motive of the employee is immaterial, so that it makes no difference that it is one of private retribution on the part of the employee, impelled by personal malice toward the

passenger and without any attribute of service to the carrier."

The Ninth Circuit's ruling is consistent with all of the pertinent authorities and should not be disturbed.

IV. The Rule Followed By The Ninth Circuit Is Sound As A Matter Of Policy And Should Not Be Changed, But In Any Event It Has No Significant National Importance Sufficient To Warrant Review.

Passengers on a ship sailing upon the high seas, are wholly and solely dependent upon the common carrier and its employes for everything, even for the safety of their very lives. If they are not fed, they cannot walk down the street to a restaurant. If their accommodations are uninhabitable, they cannot call a cab and go to another hotel. If they are not well treated by the people for whose services they have paid the carrier, they cannot walk out their cabin door and go to another establishment. Most critical of all, when an American traveler enters a hotel in the Port of San Pedro, California, or anywhere else in the United States, she is protected by the law enforcement authorities and criminal justice system of her country. When she steps aboard Petitioner's Liberian-flag cruise ship as Respondents did at San Pedro, California, she is in effect at best unwittingly entering Liberia, and in reality, stepping into a domain where there is no public law enforcement authority, and no criminal justice system.

The consequences are manifold. The passenger becomes wholly dependent upon the common carrier and its crewmember employees, for safety. There is no criminal justice system deterrent to criminal misconduct. The passengers are fair game for any crewmember miscreant.

When a passenger is victimized by a crewmember, unlike a hotel guest, a passenger cannot call police to apprehend the perpetrator, and there is no public authority available to make an unbiased, reliable investigation of the facts. Since all cruise ships are foreign flag

vessels, manned by foreign nationals primarily from Third World countries where they cannot be traced, much less subjected to criminal penalties, they go scot free. Intentional misdeeds by crewmembers are typically surreptitious. For proof of facts and circumstances, a passenger victim is dependent upon vessel personnel, but they are by definition transient, and typically either gone, or at best widely scattered about the oceans on vessels even if still employed by the involved carrier. The carrier is hardly motivated to inculpate itself by investigating impartially and disclosing the results. The practical reality is that if passenger victims are required to prove that they were assaulted because of negligence of the carrier itself separate and apart from the conduct of the assailant, they will generally be left without redress.

If the rule of absolute carrier responsibility for the intentional mistreatment of passengers by carrier crewmembers were changed, the practical effect would be that the resulting damages would fall upon the victims, who cannot insure against the pain and suffering, and havoc wrought upon their lives. Enterprise liability is particularly appropriate as a matter of policy when victims cannot protect themselves by insurance, but the enterprise can. The carriers participating in the giant cruise ship industry, all foreign flag, can insure against such damages. The cruise ship business is a major and growing industry, and it can well afford to provide itself with insurance to compensate its customers who are raped or otherwise assaulted by its shipboard personnel. During the years 1987–1989, Carnival itself transported a huge number of passengers from U.S. ports, see *Partesi v. Carnival Cruise Lines,* 1991 AMC 1401, 1402, note 2 (D.N.J. 1990) indicating that Carnival transported 52,524 passengers from New Jersey alone, constituting only 3–4% of its business.

If New Jersey passengers made up 3%, this would equate to about 1,749,000 passengers or about 580,000 per year. If New Jersey contributed 4%, the figures would be about 1,313,000 in all, or 437,000 per year. In its brief, Carnival quotes recent annual passenger figures of 4,000,000 for the entire industry, so Carnival's share appears to be 10–15% even if its business has not increased since

1989. Plainly there are ample revenues for Carnival and the other members of the industry to spread the risk by insuring against responsibility for the damages suffered by the unfortunate few who are victimized by crewmember misconduct.

While many people go on cruises, and while the consequences of crew misconduct can be catastrophic for the few passengers who are victimized, nevertheless this case has no national importance because fortunately such incidents are very, very rare. The deposition testimony of Carnival's claims manager indicates only 6 or 7 claims of improper crew member contact per year, of which only 20% turn out to be well-founded. If Carnival's market share is 10–15%, this suggests a frequency of only about 50–70 *claims* per year for the entire industry, with only about 20% or 10–15 proving to be factual, from 4,000,000 passengers carried. Even if 10–15 people per year are affected by actual incidents, some may be seriously harmed, but the consequences to some will be trivial. The import of this case to the nation in general, the traveling public, and the cruise ship industry is plainly minimal and insufficient to justify review.

This case is of major import only to the two respondents who have been gravely harmed by the misconduct of Carnival's employee, and who have been pleading for their day in court for over four years now. They should have that day as quickly as possible.

CONCLUSION

This Court should deny Carnival's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN MORTON; WILLIAM MORTON,

Plaintiffs-Appellants,

v.

JOAQUIN MARTINS DE OLIVEIRA, and CARNIVAL CRUISE LINES, INC.,

Defendants-Appellees.

No. 91-55125

D.C. No. CV-90-0315-WMB

ORDER

FILED

MAR 17 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BEFORE: BRUNETTI, O'SCANNLAIN, and T.G. NELSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
SEP 14 1993
OFFICE OF THE CLERK

No. 92-1987

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CARNIVAL CRUISE LINES, INC.,
Petitioner,
v.
SUSAN MORTON and WILLIAM MORTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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OCTOBER TERM, 1993

No. 92-1987

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUSAN MORTON and WILLIAM MORTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

I. FEDERAL ADMIRALTY LAW DOES NOT IMPOSE ABSOLUTE LIABILITY FOR A CREWMEMBER'S TORTS OUTSIDE THE SCOPE OF EMPLOYMENT

In their brief in opposition, Respondents accept Petitioner's contention that this case is controlled by *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887), a case never cited by the court below. *See* Opp. Br. 2, 4. Respondents differ from Petitioner only in their interpretation of *Brockett*. Respondents' interpretation of *Brockett*, however, disregards the plain language of that decision.

Respondents' characterization of *Brockett* as imposing absolute liability for the torts of a crewmember, whether or not committed within the scope of employment, is based on the Court's statement that a common carrier

"undertakes absolutely to protect [passengers] against the misconduct of its own servants engaged in executing the contract." Opp. Br. 4-5 (citing *Brockett*, 121 U.S. at 645). Respondents argue that the phrase "servants engaged in executing the contract" refers to "personnel manning the conveyance . . . even if the employee is acting *outside* the scope of employment." Opp. Br. 5 (emphasis in original).

By focusing on a single ambiguous phrase in *Brockett*, and arbitrarily resolving the ambiguity in their favor, Respondents fail to account for the numerous other explicit references in *Brockett* to the "scope of employment" restriction. These references, many of which appear on the same page as the passage relied upon by Respondents, make clear that vicarious liability in admiralty—like vicarious liability in shoreside common law—is limited to an employee's actions within the scope of employment. *See* 121 U.S. at 645 ("within the scope of their general employment, or when in the discharge of special duties imposed upon them"); *id.* ("while transacting the company's business, and when acting within the general scope of their employment"); *id.* ("done in the course of his employment"); *id.* ("in the conduct of his business"); *id.* at 646 ("enforcement of reasonable regulations established by the carrier for the conduct of its business"); *id.* at 649 ("while assisting another servant in enforcing [the ship's] regulation as to deck passengers").

II. THE SHORESIDE COMMON CARRIER CASES CITED BY RESPONDENTS ARE INAPPLICABLE AND CONTRARY TO ESTABLISHED MARITIME PRECEDENT

Respondents cite two railroad cases, *Stewart v. Brooklyn & C.R.R. Co.*, 90 N.Y. 591 (1882) and *New Orleans & N.E.R.R. v. Jopes*, 142 U.S. 18 (1891), to support their view that a cruise line is absolutely liable for any assault by a crewmember, whether or not the act was

within the scope of employment.[1] Both cases involved shoreside assaults wherein the courts relied upon the special fare-paying status of the plaintiffs in applying a strict liability standard. However, this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), found that maritime law, in its effort to promote simplicity, uniformity and practicality, rejects such traditional shoreside common law distinctions which have "produced confusion and conflict." *Id.* at 630-31.

As *Kermarec* recognized, maritime law is distinct from traditional common law and is molded by unique policy considerations. "The inconsistent and diverse results reached by courts which have tried to apply to the facts of shipboard life common-law distinctions . . . reinforce the conclusion here reached." *Id.* at 632 n.10. While a cruise ship may be a common carrier in the colloquial sense that it carries members of the public, such status does not, *a fortiori*, warrant application of land-based principles of carrier liability.

Kermarec rejected the determination of the standard of care based on classes and subclasses of plaintiffs and instead mandated a simple and practical standard of care applicable to all shipboard torts. The only recognized exception was crewmembers or other employees who receive special protection by virtue of the hazards of their work. *Kermarec* expressly abolished the common law distinction between licensees and other invitees. *See* 358 U.S. at 631-32.

Respondents now urge this court to resurrect the very distinctions abolished in *Kermarec*, holding that "passengers" are a separate class of plaintiffs, apart from other victims of crime. The result is that a cruise line

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[1] Likewise, the only treatise cited by Respondents that analyzes the vicarious liability question in detail, *American Jurisprudence 2d*, does so only in the context of railroad and taxi cases, and does not discuss the issue as a matter of admiralty law. *See* Opp. Br. 13-14; 14 Am. Jur. 2d § 908 n.2 (1964).

will be absolutely liable to a passenger (*i.e.*, a business licensee), but not absolutely liable to any other visitor, independent contractor, fellow employee or person who might befall the same unfortunate fate.

As a matter of public policy, it makes little sense to offer a higher level of protection to passengers than to others who may legitimately board a cruise ship. While Respondents attempt to classify the distinction as being based on the status of the tort (intentional v. negligent), the only authority cited is that passengers aboard trains and buses have under the common law been entitled to a higher degree of care, including strict liability for assaults. Under maritime law, however, the circuit courts have consistently held that the *Kermarec* "reasonable care under the circumstances" standard of care is applicable to *all* passenger actions against cruise lines. *See* Pet. 12-14.

Even if the maritime standard of vicarious liability is to be based on the shoreside standard, as Respondents urge, the applicable standard should be the one applicable to shoreside activities that are analogous to those on a cruise ship. A modern cruise ship is a floating city with hundreds of workers, such as photographers, food servers, chefs, dancers, musicians, security officers, bartenders, casino dealers, receptionists, telephone operators, television repairmen, doctors, nurses, children's counsellors, and maids. Courts have found hotels cannot be held strictly liable for sexual assaults by on-duty hotel dining stewards. *Pittard v. Four Seasons Motor Inn, Inc.*, 688 P.2d 333 (N.M. App. 1984). Cities have not been held strictly liable for sexual assaults by on-duty police officers. *Mary M. v. City of Los Angeles*, 225 Cal. App. 3d 666 (1988), *rev'd on other grounds*, 54 Cal. 3d 202, 814 P.2d 1341 (1991). Hospitals have not been held strictly liable for sexual assaults of minor patients by staff nurses. *Maguire v. Montana*, 254 Mont. 178, 835 P.2d 755 (1992); *G.L. v. Kaiser Found. Hosp.*, 88 Or. App. 528, 746 P.2d 731 (1987), *aff'd*, 306 Or. 54, 757 P.2d 1347 (1988). While the cruise operator is bound to exercise

reasonable care in the selection, supervision, and retention of employees, a rule of absolute liability for criminal acts is contrary to those shoreside situations that are truly analogous.

III. THE RULE OF ABSOLUTE LIABILITY ADOPTED BY THE NINTH CIRCUIT WILL HAVE SERIOUS ADVERSE EFFECTS

As indicated in our petition, a rule of absolute liability in federal admiralty law will have important public policy implications. Pet. 16-19. Respondents' principal argument in response, that a small number of cases will be affected by the rule, is factually unfounded; it is based on an extrapolation from the number of *legitimate* claims and multiplied by *Carnival's* market share. Obviously, the number of admiralty claims in state and federal courts encompasses legitimate and illegitimate claims. Further, an extrapolation from Carnival's experience is meaningless if, as Carnival believes, its safety record is superior to the industry average. The more telling figure, cited in our petition, is the 2,752 maritime personal injury claims filed in federal courts alone in the year ending September 30, 1992.[2] Pet. 18.

In addition, the historical number of illegitimate claims is not static, but can be expected to increase in response to the more expansive rule of liability. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1289 (1991). That development will necessarily translate into higher costs to be passed along to passengers. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991) ("passengers who purchase tickets containing a forum selection clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that

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[2] *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 28 (1992).

the cruise line enjoys . . ."). In addition, as the more expansive rule of liability creates an incentive for false accusations against crewmembers, those false accusations will place a painful cloud over the crewmembers involved.

Finally, absolute liability will deter ship owners from cooperating with criminal investigations of assaults against passengers. By making a cruise line liable in *every* case of an assault by a crewmember, not just in cases that involve negligent hiring, retention, or supervision, a rule of absolute liability may reduce the extent to which a cruise line cooperates with criminal investigations of shipboard assaults. Any effort by the line to uncover and preserve evidence of such crimes would be rewarded by civil liability against the line.[3]

IV. THE PROPER DEVELOPMENT OF ADMIRALTY DOCTRINE BY THIS COURT IS IMPORTANT TO THE DECISION OF CASES BY LOWER COURTS IN A RANGE OF FIELDS BESIDES ADMIRALTY

While review of the Ninth Circuit's decision is important simply to provide guidance to lower courts in deciding admiralty cases, the Ninth Circuit's decision—and this Court's review of the decision—has significance far beyond the confines of admiralty. The scope of vicarious liability for an employee's conduct is, of course, an issue in shoreside common law claims as well as in admiralty. Contrary to Respondents' contention, then, if the decision below is permitted to stand, it is simply not true that it "is of major import only to the two respondents." Opp. Br. 17.

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[3] Nor is there any merit to Respondents' suggestion that admiralty law should impose absolute liability because shipowners are better able to insure against the costs of civil liability for unauthorized, unforeseen shipboard criminal assaults. Opp. Br. 16. This claim directly conflicts with the well-established rule that a shipowner is not an absolute insurer of passengers' safety. *See Stokes v. Saltonstall*, 38 U.S. (13 Pet.) 181, 191 (1839); *The City of Panama*, 101 U.S. 453, 462 (1880); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 64-65 (2d Cir. 1988).

The Ninth Circuit's decision does not establish absolute liability in areas other than admiralty, but the admiralty decisions of federal courts frequently influence the course of parallel issues in shoreside law. For example, this Court's decisions concerning the validity of forum selection clauses in maritime contracts, *Carnival Cruise Lines, Inc. v. Shute, supra,* and *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), are frequently relied upon for their persuasive value by lower courts considering forum selection clauses in non-maritime contracts. *See, e.g., Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1218-19 (3d Cir.) (forum selection clause in reinsurance agreement), *cert. denied*, 112 S. Ct. 302 (1991); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757, 758 (7th Cir. 1992) (forum selection clause in warranty); *Stauffacher v. Bennett*, 969 F.2d 455, 458-59 (7th Cir.) (forum selection clause in investment contract), *cert. denied*, 113 S. Ct. 814 (1992); *Morgan v. McNiff*, 797 F. Supp. 325, 326 (S.D.N.Y. 1992) (choice of law clause in promissory notes). The potential for the decision below to influence lower courts to apply absolute liability in non-maritime personal injury cases thus provides a further practical ground for review by this Court.

CONCLUSION

This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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